No. 82-960

IN THE

In the Supreme Court of the United States

OCTOBER TERM, 1982

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

CITY DISPOSAL SYSTEMS, INC., RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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COUNTERSTATEMENT OF THE QUESTION PRESENTED

Whether the Board erred in concluding that an employee's individual refusal to perform assigned work which he claims, without substantial objective evidence, to be unsafe for him personally, in the absence of any grievance under or reference to a collective bargaining agreement, as well as in the absence of any involvement of his union or of other employees, is "concerted" activity protected by Section 7 of the National Labor Relations Act, 29 U.S.C. § 157.

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Respondent City Disposal Systems, Inc.[1] respectfully requests that this Court deny the National Labor Relations Board's Petition for a Writ of Certiorari in this case seeking review of the Judgment of the United States Court of Appeals for the Sixth Circuit entered on July 22, 1982.

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[1] Respondent City Disposal Systems, Inc., a Michigan corporation, has no parent corporation, non-wholly owned subsidiaries, or affiliates.

OPINIONS BELOW

The Opinion of the Court of Appeals for the Sixth Circuit (Petition, App. A, 1a-5a) is reported at 683 F.2d 1005 (6th Cir. 1982). The Decision and Order of the National Labor Relations Board (Petition, App. C, 7a-21a) is reported at 256 N.L.R.B. 451 (1981).

JURISDICTION

The jurisdictional requisites are correctly summarized in the Petition. Respondent does not question the jurisdiction of this Court.

STATUTORY PROVISIONS INVOLVED

Section 7 of the National Labor Relations Act (the "Act"), 29 U.S.C. § 157, provides in pertinent part:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . . .

Section 8(a) of the Act, 29 U.S.C. § 158(a), provides in pertinent part:

> It shall be an unfair labor practice for an employer —
>
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7 . . . .

Section 203(d) of the Act, 29 U.S.C. § 173(d), provides as follows:

> Final adjustment by a method agreed upon by the parties is declared to be the desirable method for settlement of grievance disputes arising over

> the application or interpretation of an existing collective bargaining agreement . . . .

Section 301(a) of the Act, 29 U.S.C. § 185(a), provides as follows:

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

COUNTERSTATEMENT OF THE CASE

Respondent makes the following additions or clarifications to Petitioner's statement of the factual and procedural background of this case:

1. Employee James Brown's refusal on Monday, May 14, 1979 to operate truck 244 as assigned by Respondent was assertedly based upon a brake problem truck 244 had had two days earlier on Saturday, May 12, 1979 (Petition, App. A, 2a; App. C, 13a). However, when truck 244's brake problem was discovered on Saturday, May 12, 1979, Respondent's mechanics stated in Brown's presence that the brake problem "would be fixed over the weekend or by the first thing Monday morning" (Petition, App. A, 2a). Significantly, the record is devoid of any evidence that from Friday, May 12, 1979 (when the brake problem was discovered) until Monday, May 14, 1979 (when Brown refused to operate truck 244), Brown ever looked at, inspected, tested, or in any fashion investigated to see whether truck 244's brakes had been repaired as the

mechanics said they would be. After Brown's refusal, another driver operated truck 244 without incident (Petition, App. C, 19a).

On this record, the Administrative Law Judge nevertheless held that on May 14 Brown had an "honest belief that the brakes on truck 244 were inadequate" based upon the problem that existed on May 12, and even placed added reliance on the fact that Respondent had not, "by either word or demonstration," undertaken to disprove Brown's claim (Petition, App. C, 19a). Neither the Board's Decision and Order (Petition, App. C, 7a-8a) nor the Opinion of the Sixth Circuit Court of Appeals (Petition, App. A, 1a-5a)[2] addressed Respondent's challenge that no substantial objective evidence supported the ALJ's finding that, under these factual circumstances, Brown had a reasonable and honest belief that truck 244's brakes were unsafe.

2. Brown's refusal to operate truck 244 was an individual act based upon his statement that the truck "has got problems and I don't want to drive it " (Petition, App. C, 13a). "There is no evidence in the record that he asserted an interest on behalf of anyone other than himself. Brown did not attempt to warn other employees not to drive the truck he believed to be unsafe. . . . Likewise, Brown did not go to his union representative in an effort to avoid driving the truck he considered unsafe" (Petition, App. A, 4a). After his refusal, he simply "went home" (Petition, App. C, 14a). Although Brown filed a grievance through his union *after* his employment was terminated, the record is devoid of any evidence that, when he refused to operate truck 244, Brown was attempting to grieve under

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[2] The Sixth Circuit's Opinion denying enforcement on other grounds rendered unnecessary a ruling on this point, which has been preserved by Respondent.

or make reference to the collective bargaining agreement's article pertaining to vehicle safety (Petition, App. A, 4a-5a; App. C, 14a-15a).

Thus, Brown's termination by Respondent preceded, and was unrelated to, any grievance or other reference to the collective bargaining agreement, as well as any involvement of his union or other employees. He was terminated solely for refusing to do his assigned job and then going home.

REASONS FOR DENYING THE PETITION

Respondent submits that the Petition should be denied because the question properly framed by the facts in the present case is *not* the subject of conflicting opinions in the courts of appeal, and, furthermore, is *not* a significant issue in the administration of the National Labor Relations Act.

As will be shown, the question of whether an individual employee's filing or assertion of a grievance pursuant to a collective bargaining agreement — which has come to be known as the *Interboro*[3] doctrine — may indeed be the subject of conflicting opinions in the courts of appeal. However, that legal question is not presented in this case because, as a factual matter, Brown plainly did not assert or even attempt to assert a grievance pursuant to the collective bargaining agreement, nor did he make any reference to the collective bargaining agreement. Simply stated, Brown individually refused to perform assigned work in a context barren of Section 7 concerted activity; his conduct was merely a personal "gripe." No conflict in the opinions of the courts of appeal exists in these factual circumstances. Board orders in such cases have universally been denied enforcement.

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[3] See *Interboro Contractors, Inc.*, 157 N.L.R.B. 1295 (1966), *enf'd*, 388 F.2d 495 (2d Cir. 1967).

A review of the Second Circuit's opinion in *NLRB* v. *Interboro Contractors, Inc.*, 388 F.2d 495 (1967), and similar cases in other courts of appeal demonstrates the inapplicability of the *Interboro* doctrine to this case.

In *Interboro Contractors, Inc.*, two employees *grieved* and brought their union into a number of contractual pay and working conditions disputes with their employer, which resulted in the discharge of the two employees. They were manifestly involved in "concerted" activity inasmuch as both of the two employees as well as the union participated, and the Second Circuit so held. However, the court went on to state, in the dictum of an alternative holding, a principle which has become known as the *Interboro* doctrine:

> [W]hile interest on the part of fellow employees would indicate a concerted purpose, activities involving attempts to enforce the provisions of a collective bargaining agreement may be deemed to be for concerted purposes even in the absence of such interest by fellow employees. 388 F.2d at 500.

Thus, the *Interboro* doctrine demands, at a minimum, that the individual employee's conduct constitute an attempt to enforce the provisions of a collective bargaining agreement between his union and his employer — which conduct is customarily known as "grieving."

The Second Circuit cited *Interboro Contractors, Inc.*, in its later decision in *NLRB* v. *John Lagenbacher Co.*, 398 F.2d 459, 463 (2d Cir. 1968), *cert. denied*, 393 U.S. 1049 (1969), which presented factual circumstances nearly identical to those in the original *Interboro* case: three employees *grieved* and brought

their union into a pay dispute with their employer, which resulted in the layoff of the three employees.[4]

The decisions of other courts of appeal which the Board's Petition cites as having "adopted the reasoning of the Second Circuit in *Interboro* on this issue" (Petition, 8-9) have also all involved an employee's actual filing or assertion of a *grievance* pursuant to the collective bargaining agreement. Thus, in *NLRB* v. *Ben Pekin Corp.*, 452 F.2d 205 (7th Cir. 1971), a janitor *grieved* a pay shortage affecting all of the employer's janitors, which led to a meeting of all the janitors and their union representatives, and ultimately caused his discharge. Citing the *Interboro* doctrine, the Seventh Circuit held that the janitor had engaged in concerted activity — which was clearly the case even apart from the *Interboro* doctrine. Likewise, in *NLRB* v. *Town & Country LP Gas Service Co.*, 687 F.2d 187 (7th Cir. 1982), the Seventh Circuit held that an individual employee's pursuit of a *grievance* under the collective bargaining agreement alleging disparate treatment of employees — which ultimately motivated the employer to discharge him — was concerted activity within the protection of Section 7.[5]

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[4] In its only other case dealing with the *Interboro* doctrine, *Ontario Knife Co.* v. *NLRB*, 637 F.2d 840, 845 (2d Cir. 1980), the Second Circuit acknowledged that the doctrine began as dictum and refused to extend it beyond the factual circumstances presented in the *Interboro* case.

[5] *Pelton Casteel, Inc.* v. *NLRB*, 627 F.2d 23, 28 n. 10 (7th Cir. 1980), cited by the Board (Petition, 9), reaffirmed the Seventh Circuit's adoption of the *Interboro* doctrine. The doctrine was inapplicable in *Pelton Casteel*, however, because there was no union and, consequently, no collective bargaining agreement. Denying enforcement of a Board order, the court ruled that an employee had merely engaged in unprotected personal "griping" by complaining about job rates and overtime.

The Eighth Circuit's decision in *NLRB* v. *Selwyn Shoe Manufacturing Corp.*, 428 F.2d 217, 219-221 (8th Cir. 1970), upheld the Board's finding that an employee had engaged in concerted activity by vigorously complaining of, and properly invoking the *grievance* procedure over, the employer's violation of the seniority provisions of the collective bargaining agreement. The court concluded: "The submission of a *grievance* based on the collective bargaining agreement cannot be the basis for discharge." 428 F.2d at 221 (emphasis added).[6]

Nevertheless, as the Board's Petition observes (Petition 9-10), a number of courts of appeal have expressly repudiated the *Interboro* doctrine, based upon a conclusion that it creates a legal fiction, a type of "constructive" concerted activity, beyond the scope or intent of Section 7. See *NLRB* v. *Northern Metal Co.*, 440 F.2d 881, 884 (3d Cir. 1971); *NLRB* v. *Buddies Supermarkets, Inc.*, 481 F.2d 714, 719 (5th Cir. 1973); *ARO, Inc.* v. *NLRB*, 596 F.2d 713, 716-717 (6th Cir. 1979). See also *Krispy Kreme Doughnut Corp.* v. *NLRB*, 635 F.2d 304, 306-307 (4th Cir. 1980); *Kohls* v. *NLRB*, 629 F.2d 173, 176-177 (D.C. Cir. 1980), *cert. denied*, 450 U.S. 931 (1981).

Thus, a clear conflict appears to exist among the courts of appeal as to whether the *Interboro* doctrine — which, as the above-cited cases demonstrate, would treat as "concerted" activity an individual employee's grievance filed pursuant to a collective bargaining

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[6] See also *Keokuk Gas Service Co.* v. *NLRB*, 580 F.2d 328, 333 (8th Cir. 1978), in which the Eighth Circuit found that an employee/union steward had engaged in concerted activity — for which he had been discharged — by threatening to file a *grievance* under the collective bargaining agreement.

agreement[7] — is a permissible construction of Section 7. If that question were presented here, Respondent would be hard pressed to argue that it should not be resolved by this Court. However, that question is not presented and cannot be presented in the instant case because, as a factual matter, Brown never grieved, made reference to, or otherwise attempted to enforce the collective bargaining agreement's article pertaining to vehicle safety, nor did he attempt in any fashion to involve his union representatives or other employees. Brown simply refused to drive truck 244 as assigned and went home.[8]

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[7] An employee's filing of a grievance stands on a legal footing far different from his merely refusing to work and going home — which is all that Brown did in this case. First, it plainly effectuates federal labor policy favoring resolution of disputes by grievance arbitration rather than by work stoppage. See Section 203(d) of the Act, 29 U.S.C. § 173(d); *Steelworkers* v. *American Mfg. Co.*, 363 U.S. 564, 566 (1960); *Gateway Coal Co.* v. *Mine Workers*, 414 U.S. 368, 376-380 (1974). Second, an individual employee's filing of a grievance would appear to be intended to, and generally does, bring the employee's union representative into the dispute, whereas refusing to work and going home does not. See *NLRB* v. *Weingarten, Inc.*, 420 U.S. 251, 260 (1975) ("The action of an employee in seeking to have the assistance of his union representative at a confrontation with his employer clearly falls within the literal wording of § 7 . . ."); see also *Garment Workers* v. *Quality Mfg. Co.*, 420 U.S. 276, 280 n. 2 (1975).

[8] Furthermore, Brown's refusal was not predicated upon substantial objective evidence that truck 244 was unsafe. The case accordingly fails to meet the Board's acknowledged requirement that the employee's belief must be reasonable and honestly held (Petition, 5-6; App. C, 19a) — a factual issue which Respondent has preserved. See footnote 2. This Court's decision in *Gateway Coal Co.* v. *Mine Workers*, 414 U.S. 368, 386-387 (1974), makes clear that any belief as to unsafe working conditions must be based upon ascertainable, objective evidence rather than merely a naked assertion.

It strains the language and historical construction of Section 7 to suggest that an individual employee's flatly refusing to perform assigned work and going home, without more, constitutes concerted activity. The courts of appeal which have been confronted with such cases have, like the Sixth Circuit in the instant case, consistently refused to find concerted activity.

In *NLRB* v. *C & I Air Conditioning, Inc.*, 486 F.2d 977, 978-979 (9th Cir. 1973), an employee refused to work due to a condition which he perceived to be unsafe. Denying enforcement of the Board's order, the Ninth Circuit observed that the employee was merely protesting on his own behalf, that he had made no reference to the collective bargaining agreement, and that there was no evidence that he either knew of the collective bargaining agreement or was trying to enforce its terms.

Similarly, in *Kohls* v. *NLRB*, 629 F.2d 173, 177 (D.C. Cir. 1980), *cert. denied*, 450 U.S. 931 (1981), the District of Columbia Circuit held, in a case nearly identical to the case at bar, that a truck driver's refusal to operate a truck he believed had a brake problem did not constitute concerted activity, even though the collective bargaining agreement contained an article pertaining to vehicle safety. Denying enforcement of the Board's order, the court noted that the driver had asserted only his own interest, did not attempt to warn other employees, did not grieve prior to his discharge, and did not otherwise act in concert with his union or other employees.

In addition to the instant case, the Sixth Circuit has twice found that mere refusals by individual employees to perform assigned work did not constitute concerted activity. See *Bay-Wood Industries, Inc.* v. *NLRB*, 666 F.2d 1011 (6th Cir. 1981) (employee

who refused to operate an allegedly unsafe radial saw was acting solely in his own interest, filed no grievance, and was unfamiliar with the safety provisions of the collective bargaining agreement); and *United Parcel Service* v. *NLRB*, 654 F.2d 12 (6th Cir. 1981) (employee refused to operate an allegedly unsafe trailer door).[9]

The Board's Petition cites no court of appeals opinion, and Respondent is aware of none,[10] in which concerted activity has been found in factual circumstances where, like here, an employee has simply refused to perform assigned work without grieving pursuant to the collective bargaining agreement or otherwise involving his union or other employees.

In sum, no conflict among the courts of appeal exists as to the question framed by the factual circumstances of this case. Each of the courts of appeal which has opined on the question raised here has refused to find concerted activity protected by Section 7, reasoning that the statutory language requires substantially more activity than a mere individualized refusal to perform assigned work. While it appears that a conflict among the courts of appeal exists as to

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[9] The Sixth Circuit has found the refusal by an individual employee to drive an allegedly unsafe truck to constitute concerted activity protected by Section 7 where union representatives and other employees were involved in the dispute along with the individual employee — which clearly resulted in concerted activity. See *McLean Trucking Co.* v. *NLRB*, 689 F.2d 605 (6th Cir. 1982).

[10] In *Roadway Express, Inc.* v. *NLRB*, 532 F.2d 751 (4th Cir. 1976), the Fourth Circuit, without opinion, enforced a Board order on facts similar to those here. See 217 N.L.R.B. 278 (1975). However, the Fourth Circuit's subsequent opinions in *Krispy Kreme Doughnut Corp.* v. *NLRB*, 635 F.2d 304, 306-307 (4th Cir. 1980), and *Blaw-Knox Foundry & Mill Machinery, Inc.* v. *NLRB*, 646 F.2d 113, 116 (4th Cir. 1981), demonstrate that that court would refuse to find concerted activity on such facts.

the Board's *Interboro* doctrine — a question which may deserve resolution by this Court — that question is not properly presented by the facts in this case.

Furthermore, the question framed by this case is not a significant one in the administration of the National Labor Relations Act. An individual employee who is terminated for refusing to perform assigned work clearly has a contractual remedy if, as is contended by the Board in this and similar cases, the collective bargaining agreement justifies or excuses his non-performance. Indeed, after he was terminated Brown did pursue his contractual remedy into the initial stages of the grievance procedure, but pressed it no further (Petition, App. C, 15a). He did not pursue available remedies under Section 301(a) of the Act, 29 U.S.C. § 185(a), or assert a claim under Section 502 of the Act, 29 U.S.C. § 143. Nor did he seek a remedy under the Occupational Safety and Health Act, 29 U.S.C. § 651 *et seq.*; see *Whirlpool Corp.* v. *Marshall*, 445 U.S. 1 (1980). Thus, the Court need not have an abstract concern that Brown was left without a remedy to address the basis for his "gripe" as well as his subsequent termination.

CONCLUSION

The Board's Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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